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No. 91-1524

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

CONSOLIDATED RAIL CORPORATION,

Petitioner,

vs.

FRANK J. ESCHBERGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

OBJECTION TO MOTION OF ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

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The motion to file a brief as *amicus curiae* of Association of American Railroads (hereinafter AAR) should be denied because its proposed brief brings no relevant matters to the Court's attention that is not already covered in the petition for certiorari that was already submitted to this Court. In fact, the motion does

not even make an attempt to identify matters which are not adequately covered in the petition for certiorari. Apparently, this Court is expected to overlook the presumption of disfavor of such motion stated in Rule 34.2 of this Court's rules solely on the basis of self-serving assertion of its own "expertise in railroad equipment and operation", and the activities of its predecessor nearly a hundred years ago.

The instant motion should be especially disfavored because the motion papers and attached brief are replete with misstatements of the duty imposed upon railroads by Federal Safety Appliance Act (hereinafter FSAA) §2, and this Court's holdings concerning it. Contrary to assertions made in the proposed brief, this Court, in *Affolder v. New York C. & St. L. R. Co.*, 339 U.S. 95 (1950) specifically held that liability under FSAA §2 is *not* dependent upon proof that a coupler is defective. *Affolder, supra*, 339 U.S. at 99.

The same misconstructions of the case of *United Transportation Union v. Lewis*, 711 F2d 233 (D C Cir 1983) that are made in this petition are repeated in the proposed brief. With regard to the claims that the Federal Railroad Administration favors the existence of a misaligned drawbar defense, it should be noted that the brief submitted by it in the *Lewis* case reached the opposite conclusion. *Lewis, supra*, 711 F2d at 251, footnote 39. The statements made in Footnote 5 of the *Lewis* case concerning automatic realigning devices were made nine years ago, in 1983, and were in turn based upon statements in another case decided nine years prior to the *Lewis* decision, in 1974. Thus, nothing said in the *Lewis* case provides any indication of what percentage of railroad cars are *presently* equipped with automatic realigning devices.

In sum, the motion to file an *amicus curiae* brief should be denied because the proposed brief merely repeats arguments already made to this Court in the petition. Therefore, the proposed brief is at best redundant and at worse a hindrance and an unnecessary burden to this Court. The motion for leave of AAR to submit an *amicus curiae* brief should be denied.

CONCLUSION

The motion of Association of American Railroads for leave to file an *amicus curiae* brief should be denied.

Respectfully submitted,

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